

TITLE 327 WATER POLLUTION CONTROL BOARD

FIRST NOTICE OF COMMENT PERIOD

LSA Document #10-____

DEVELOPMENT OF NEW RULES AND AMENDMENTS TO RULES CONCERNING NPDES GENERAL PERMITS

PURPOSE OF NOTICE

The Indiana Department of Environmental Management (IDEM) is soliciting public comment on new rules and amendments to rules in 327 IAC 15 concerning National Pollutant Discharge Elimination System (NPDES) general permits governed by 40 CFR 122 and general permits administered by the U.S. Environmental Protection Agency (EPA). IDEM seeks comment on the affected citations listed and any other provisions of Title 327 that may be affected by this rulemaking.

CITATIONS AFFECTED: 327 IAC 5; 327 IAC 15.

AUTHORITY: IC 13-14-8; IC 13-15-1-2; IC 13-15-2; IC 13-18-3; IC 13-18-4.

SUBJECT MATTER AND BASIC PURPOSE OF RULEMAKING

Basic Purpose and Background

In 1992, 1994, and 2003, the Water Pollution Control Board adopted 327 IAC 15, "NPDES General Permit Program", to provide general permits for use by selected industries in lieu of obtaining individual permits. That article was based on programs and procedures in place at the time of adoption. Article 15 currently covers the following industries:

- Storm water runoff associated with construction activity (1992)
- Storm water discharges exposed to industrial activity (1992)
- Facilities engaged in mining of coal, coal processing, and reclamation activities (1994)
- Facilities discharging noncontact cooling water (1994)
- Wastewater discharge associated with petroleum products terminals (1994)
- Wastewater discharge associated with ground water petroleum remediation systems (1994)
- Wastewater discharge associated with hydrostatic testing of commercial pipelines (1994)
- Facilities engaged in sand, gravel, dimension stone, or crushed stone operations (1994)
- Storm water runoff associated with municipal separate storm sewer system conveyances (2003)
- On-site residential sewage discharging disposal systems within the Allen County On-Site Waste Management District (2003)
- Concentrated animal feeding operations (2003)

Since 327 IAC 15 was adopted, a number of changes have occurred in the NPDES program at the federal level. The current rule has not kept pace with those changes.

EPA has reissued, modified, and consolidated a number of the NPDES general permits.

- The EPA construction general permit was last issued in June 2008.
- The EPA Multi-Sector General Permit was effective in September 2009 to cover 28 industrial sectors that include some of the activities currently permitted under 327 IAC 15.
- The Phase II Small MS4 Storm Water Program has significantly changed the permitting system for municipal separate storm sewer systems (MS4).
- EPA is finalizing the new NPDES Pesticide General Permit in response to the 6th Circuit Court of Appeals decision in *National Cotton Council of America et al. v. U.S. Environmental Protection Agency* (553 F.3d 927) that must be in place by April 9, 2011.

As described in IC 13-18-1-2, the Water Pollution Control Board (board) consists of twelve members, one of whom must be a "representative of manufacturing employed by an entity that holds an NPDES major permit" (added by P.L.90-1998, SECTION 19).

In March 2010, the Regional Administrator of EPA Region 5, Chicago, Illinois, notified the department that "... the Indiana statute conflicts with EPA regulations governing state NPDES programs at 40 CFR 123.25(c), which provides:

- (c) State NPDES programs shall ensure that any board or body which approves all or portions of permits shall not include a s a member any person who receives, or has during the previous 2

years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

"EPA promulgated this regulation consistent with nearly identical language at CWA (Clean Water Act) Section 304(i)(2)(D), 33 U.S.C. 1314(i)(2)(D). Under the CWA and its implementing regulations, an NPDES permit cannot be issued by a board a member of which is employed by an entity holding an NPDES permit, as mandated by IC 13-18-1-2(a)(2)(B)". (EPA Region 5 letter dated March 9, 2010)

Since Indiana's NPDES general permits are "permits by rule" and are effectively issued by the board, this creates a conflict of interest that requires revision of Indiana's NPDES program. EPA recommended that the authority for issuing NPDES general permits be transferred from the board to the department. That transfer is a major goal of this rulemaking.

Another issue raised by EPA is the lack of a renewal process for NPDES general permits under the existing rules. The permit term for a general permit is five years, after which time the general permit is to be reissued in draft form to allow for comment by EPA and the public. Adding a renewal process that meets the standards of the Clean Water Act is also a goal of this rulemaking.

This rulemaking would consolidate all NPDES general permit rules in one article with the exception of general permit rules for concentrated animal feeding operations (CAFOs) proposed to be eliminated in LSA Document #09-213 (DIN: 20100811-IR-327090213SNA). The elimination of the CAFO general permit is part of a separate rulemaking to update the CAFO NPDES rules in accordance with updated federal CAFO requirements (November 20, 2008, 73 FR 70417). The department intends to create as streamlined and efficient a permitting process as possible within the confines of federal and state law.

The move from "permit by rule" general permits to administratively issued general permits is intended to be a purely procedural move. That is, the regulatory requirements on affected permit holders will remain the same, except in those cases where new federal requirements have been put in place since the last amendments to the state general permit rules. Those requirements will be included in the draft general permits when they are made available for public comment as required under the CWA.

IDEM will be working to assure a smooth transition from the general permits by rule to administratively issued general permits so that no gap in coverage occurs.

Alternatives to Be Considered Within the Rulemaking

Alternative 1.

Amend existing rules or add new rules to transfer the authority to write NPDES general permits to the commissioner.

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? This alternative may incorporate federal standards as needed.
- Is this alternative imposed by federal law or is there a comparable federal law? This alternative is imposed by federal law and regulation: 40 CFR 122, 40 CFR 123.25(c), Clean Water Act Section 304(i)(2)(D) (33 U.S.C. 1314(i)(2)(D)).
- If it is a federal requirement, is it different from federal law? No.
- If it is different, describe the differences. Not applicable.

Alternative 2.

Amend existing rules or add new rules to add expiration dates to NPDES general permits and add public review procedures to the NPDES permitting process.

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? This alternative may incorporate federal standards as needed.
- Is this alternative imposed by federal law or is there a comparable federal law? This alternative is imposed by federal law and regulation: 40 CFR 122.46, Clean Water Act Section 402(b)(1) (33 U.S.C. 1314(b)(1)).
- If it is a federal requirement, is it different from federal law? No.

Alternative 3.

Do not amend existing rules or add new rules to transfer the authority to write NPDES general permits to the commissioner, add expiration dates, and provide for public comment.

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? No.
- Is this alternative imposed by federal law or is there a comparable federal law? No.
- If it is a federal requirement, is it different from federal law? Not applicable.

- If it is different, describe the differences. This alternative would leave Indiana with the deficiencies identified by EPA.

Applicable Federal Law

Clean Water Act Section 304(i) (33 U.S.C. 1314(i)), "Guidelines for monitoring, reporting, enforcement, funding, personnel, and manpower".

Clean Water Act Section 402(b) (33 U.S.C. 1342(b)), "National Pollutant Discharge Elimination System: State permit programs".

40 CFR 122, "EPA Administered Permit Programs: The National Pollutant Discharge Elimination System".

40 CFR 124, Subpart D, "Specific Procedures Applicable to NPDES Permits".

Potential Fiscal Impact

Potential Fiscal Impact of Alternative 1. This alternative will have no net fiscal impact to regulated entities who obtain general permits under these new provisions, since the new provisions are procedural and do not impose additional permitting burdens beyond the federal requirements.

Potential Fiscal Impact of Alternative 2. This alternative will have no net fiscal impact to regulated entities who obtain general permits under these new provisions, since the new provisions are procedural and do not impose additional permitting burdens. However, this alternative will not eliminate the conflict of interest issue.

Potential Fiscal Impact of Alternative 3. This alternative will have no direct cost to regulated entities. However, it may result in withdrawal of EPA approval of Indiana's NPDES general permit program, imposing significant new costs on regulated entities as they are required to obtain individual NPDES permits from EPA.

Small Business Assistance Information

IDEM established a compliance and technical assistance (CTAP) program under IC 13-28-3. The program provides assistance to small businesses and information regarding compliance with environmental regulations. In accordance with IC 13-28-3 and IC 13-28-5, there is a small business assistance program ombudsman to provide a point of contact for small businesses affected by environmental regulations. Information on the CTAP program, the monthly CTAP newsletter, and other resources available can be found at:

www.in.gov/idem/ctap

For purposes of IC 4-22-2-28.1, the Small Business Regulatory Coordinator for this rule is:

Alison Beumer
IDEM Small Business Regulatory Coordinator
MC 60-04 IGCS W041
100 North Senate Avenue
Indianapolis, IN 46204-2251
(317) 232-8172 or (800) 988-7901
ctap@idem.in.gov

For purposes of IC 4-22-2-28.1, the Small Business Ombudsman designated by IC 5-28-17-5 is:

Ryan Asberry
Indiana Economic Development Corporation
One North Capitol, Suite 700
Indianapolis, IN 46204
(317) 232-8962
smallbizombudsman@iedc.in.gov

Resources available to regulated entities through the small business ombudsman include the ombudsman's duties stated in IC 5-28-17-5, specifically IC 5-28-17-5(9), investigating and attempting to resolve any matter regarding compliance by a small business with a law, rule, or policy administered by a state agency, either as a party to a proceeding or as a mediator.

The Small Business Assistance Program Ombudsman is:

Brad Baughn
IDEM Small Business Assistance Program Ombudsman
MC 50-01 IGCN 1301
100 North Senate Avenue
Indianapolis, IN 46204-2251
(317) 234-3386 or (800) 451-6027

bbaughn@idem.in.gov

Public Participation and Workgroup Information

At this time, no workgroup is planned for the rulemaking. If you feel that a workgroup or other informal discussion on the rule is appropriate, please contact Steve Mojonnier, Rules Development Branch, Office of Legal Counsel at (317) 233-1655 or (800) 451-6027 (in Indiana).

STATUTORY AND REGULATORY REQUIREMENTS

IC 13-14-8-4 requires the board to consider the following factors in promulgating rules:

- (1) All existing physical conditions and the character of the area affected.
- (2) Past, present, and probable future uses of the area, including the character of the uses of surrounding areas.
- (3) Zoning classifications.
- (4) The nature of the existing air quality or existing water quality, as the case may be.
- (5) Technical feasibility, including the quality conditions that could reasonably be achieved through coordinated control of all factors affecting the quality.
- (6) Economic reasonableness of measuring or reducing any particular type of pollution.
- (7) The right of all persons to an environment sufficiently uncontaminated as not to be injurious to human, plant, animal, or aquatic life or to the reasonable enjoyment of life and property.

REQUEST FOR PUBLIC COMMENTS

At this time, IDEM solicits the following:

- (1) The submission of alternative ways to achieve the purpose of the rule.
- (2) The submission of suggestions for the development of draft rule language.

Mailed comments should be addressed to:

LSA Doc. #10-____ (NPDES General Permits)

Janet Pittman

Rules Development Branch

Office of Legal Counsel

Indiana Department of Environmental Management

100 North Senate Ave.

MC 65-45

Indianapolis, Indiana 46204-2251

Hand delivered comments will be accepted by the IDEM receptionist on duty at the thirteenth floor reception desk, Office of Legal Counsel, Indiana Government Center North, 100 North Senate Avenue, Indianapolis, Indiana.

Comments may be submitted by facsimile at the IDEM fax number: (317) 233-5970, Monday through Friday, between 8:15 a.m. and 4:45 p.m. Please confirm the timely receipt of faxed comments by calling the Rules Development Branch at (317) 233-1655.

COMMENT PERIOD DEADLINE

Comments must be postmarked, faxed, or hand delivered by [publication date plus 30 days].

Additional information regarding this action may be obtained from Steve Mojonnier, Rules Development Branch, Office of Legal Counsel, (317) 233-1655 or (800) 451-6027 (in Indiana).

Nancy King, Chief
Rules Development Branch
Office of Legal Counsel